

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CERTAIN UNDERWRITERS AT LLOYDS
AND THOSE COMPANIES SEVERALLY
SUBSCRIBING TO BOEING POLICY
NUMBER 509/JC487006, ROYAL & SUN
ALLIANCE INSURANCE PLC, RLI
INSURANCE COMPANY, ST. PAUL FIRE &
MARINE INSURANCE COMPANY, GREAT
AMERICAN INSURANCE COMPANY,
MITSUI SUMITOMO INSURANCE COMPANY
OF AMERICA, TOKIO MARINE & NICHIDO
FIRE INSURANCE COMPANY, XL
SPECIALTY INSURANCE COMPANY,
FIREMAN'S FUND INSURANCE COMPANY,
THE BALOISE INSURANCE COMPANY,
LTD., HARTFORD FIRE INSURANCE
COMPANY, ZURICH GLOBAL CORPORATE,
UK LTD.,

Plaintiffs,

- against -

YELLOWSTONE TRUCKING, INC., ANNETT
HOLDINGS, INC., and ANNETT HOLDINGS,
INC. d/b/a TMC TRANSPORTATION, INC.

Defendants.

No. 2:08-cv-00518 (JCC)

**PLAINTIFFS' MOTION FOR
RELIEF FROM THE DEADLINE
TO RESPOND TO
DEFENDANTS' MOTION TO
DISMISS**

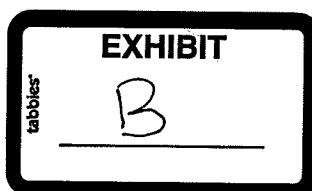
**Note on Motion Calendar:
Friday, May 16, 2008**

I. INTRODUCTION

Defendants' destruction of two Boeing jet engines has given rise to two lawsuits
between the same parties: a declaratory judgment in the Northern District of Illinois filed by
Yellowstone Trucking et al. (defendants in this lawsuit) ("Defendants"), and the instant case in

PLAINTIFFS' MOTION FOR RELIEF FROM THE
DEADLINE TO RESPOND TO DEFENDANTS'
MOTION TO DISMISS - I

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1 the Western District of Washington filed by cargo underwriter plaintiffs (i.e., defendants in the
 2 Illinois lawsuit) ("Plaintiffs"). Plaintiffs do not wish to tax the courts by requiring this litigation
 3 to proceed in two tribunals simultaneously. Therefore, although Plaintiffs believe the present
 4 action to be the first case filed in good faith concerning the matter at issue and have filed a
 5 motion to transfer the Illinois case to Washington (as well as a motion to dismiss due to a prior
 6 action pending), they request that this Court defer Plaintiffs' obligation to fully respond to
 7 Defendants' Motion to Dismiss (Docket No. 9) until the motions pending in the Northern
 8 District of Illinois are resolved.

9 II. FACTUAL BACKGROUND

10 The facts surrounding Defendants' willful destruction of the two jet engines have been
 11 set forth at length in the Complaint in this case. As a result of the damage, Plaintiffs, as cargo
 12 underwriters, paid to The Boeing Company ("Boeing") \$5,750,000.00 in subrogation. Initially,
 13 pursuant to a binding contract clause between Boeing and Defendant TMC, Plaintiffs attempted
 14 to pursue recovery of this sum in mediation. In fact, mediation was mutually scheduled for
 15 March 4, 2008 in Seattle, Washington, with retired Chief Justice of the Washington Supreme
 16 Court Robert F. Utter as the mediator. On the eve of mediation, however, Plaintiffs
 17 unexpectedly filed a declaratory judgment action in the Northern District of Illinois, despite the
 18 fact that the obviously proper venue for this litigation is Washington.

19 The planned mediation and the inappropriateness of an Illinois forum were detailed at
 20 length in Plaintiffs' (nominal defendants in Illinois) *Motion to Transfer to the Western District*
 21 *of Washington Pursuant to 28 U.S.C. Section 1404(a)*, filed on March 20, 2008, which is
 22 incorporated by reference herein ("*Motion to Transfer*"). See Exhibit A to the Declaration of
 23 Todd A. Barton ("Barton Decl."). Plaintiffs then filed the instant case, and would have done so
 24 sooner, but believed the case was progressing toward an amicably mediated resolution until
 25 ambushed by Defendants' declaratory judgment action. Plaintiffs also subsequently filed a
 26 *Motion to Dismiss [the Illinois action] Due to a Prior Action Pending*, on the basis that the

27 PLAINTIFFS' MOTION FOR RELIEF FROM THE
 28 DEADLINE TO RESPOND TO DEFENDANTS'
 MOTION TO DISMISS - 2

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1 present action constitutes a prior action pending under an exception to the first-to-file rule
 2 (“*Illinois Motion to Dismiss*”). See Barton Decl., Exh. B. In the unlikely event that the Illinois
 3 district court denies Plaintiffs’ (defendants in Illinois) motions to transfer and dismiss, Plaintiff
 4 would anticipate the dismissal of the case before this tribunal.

5 Defendants filed the instant Motion to Dismiss in this case (not to be confused with
 6 Plaintiffs’ *Illinois Motion to Dismiss*), which was re-noted for May 23, 2008. Should the Court
 7 deny Plaintiffs’ motion for relief from the deadline to respond, Plaintiff’s response brief will be
 8 due May 19, 2008. At this time, Plaintiffs do not know the date their motions to transfer and
 9 dismiss in Illinois will be resolved. So in the interest of judicial economy, Plaintiffs respectfully
 10 request that the Court grant this motion to allow Plaintiffs to defer their response to
 11 Defendants’ Motion to Dismiss until such time as the court in Illinois has ruled on the similar
 12 motions pending there.

13 III. ARGUMENT

14 A. This Court Should Defer Plaintiffs’ Obligation to Respond to Defendant’s Motion 15 to Dismiss, Pending Resolution of the Motions to Transfer and Dismiss the Similar 16 Action in the Northern District of Illinois.

17 Plaintiffs consider the present action to be, in fact, the first-filed case. The argument on
 18 this point has already been recited in their *Illinois Motion to Dismiss*, which is incorporated by
 19 reference herein. See Barton Decl., Exh. B. The argument is straightforward: Defendants’
 20 Illinois action was an impermissible declaratory judgment suit brought in anticipation of
 21 litigation and in bad faith, which had as its ultimate purpose the goal of depriving Plaintiffs
 22 their right to choose their forum. *Id.* Thus, Plaintiffs seriously dispute Defendants’ contention
 23 in their Motion to Dismiss in this tribunal that the Illinois action was the first-filed case and that
 24 the present case should be dismissed. However, Plaintiffs agree that this case should not
 25 proceed at the present time.¹

26 ¹ In their Motion to Dismiss, Defendants themselves have argued that a stay is appropriate in this case.

As discussed above, Plaintiffs have asked the Illinois Court to transfer that action to this district for the convenience of the parties, witnesses and in the interests of justice. *See* Barton Decl., Exh. A. Again, Plaintiffs consider the present action to be the proper first-filed case, but agree the potential transfer should be addressed by the Illinois District Court. Thus, in the interest of judicial economy, there is no reason that this Court should have to duplicate the inquiry. *See Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 628 (9th Cir. 1991); *see also West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 n.1 (5th Cir. 1985) ("A stay may, for example, be appropriate to permit the court of [chronological] first filing to rule on a motion to transfer.").

Even assuming *arguendo* that the Illinois action was the proper first-filed case, "where the first-filed action presents a likelihood of dismissal, the second-filed suit should be stayed, rather than dismissed." *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 628 (9th Cir. 1991). As discussed above, a meritorious Motion to Dismiss has been filed in the Northern District of Illinois. Therefore, because the propriety of the Illinois action is in question, this Court should defer Plaintiffs' response to Defendants' Motion to Dismiss in this action pending the outcome of the Illinois Motions to Transfer and Dismiss.

B. Timing of Plaintiffs' Response to Defendants' Motion to Dismiss Necessitates This Motion Under CR 7(d)(2)(A).

Local civil rules provide that a party may note for consideration a motion requesting relief from a deadline no seven or more days after filing. *See* CR 7(d)(2)(A). Accordingly, this motion is noted for May 16, 2008. If this motion is not granted, the deadline to file Plaintiff's response to Defendants' *Motion to Dismiss* falls one business day later, on Monday, May 19, 2008 (the motion is noted for hearing on Friday, May 23, 2008). Plaintiffs sought, but were unable to secure, a stipulation from Defendants agreeing to postpone Defendants' *Motion to Dismiss* until after the Illinois transfer/dismissal issues were resolved, thereby requiring this

1 motion. Plaintiffs thus request relief from the May 19, 2008 deadline until the Illinois issues
2 have been ruled upon one way or the other.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court defer their
5 obligation to fully respond to Defendants' Motion to Dismiss until twenty (20) days after
6 resolution of the Motions to Transfer and Dismiss currently under consideration by Judge
7 Lefkow in the Northern District of Illinois.

8
9 Dated: Seattle, Washington
May 7, 2008

10
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27 PLAINTIFFS' MOTION FOR RELIEF FROM THE
28 DEADLINE TO RESPOND TO DEFENDANTS'
MOTION TO DISMISS - 5

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**DECLARATION OF TODD A.
BARTON IN SUPPORT OF
PLAINTIFFS' MOTION TO
DEFER ITS RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS**

Plaintiffs' Limited Response to
Defendants' Motion to Dismiss

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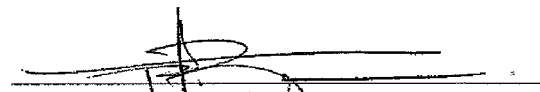
1 I, Todd A. Barton, declare that I am an associate of Maloof Browne & Eagan LLC,
 2 attorneys for Defendants, Certain Underwriters at Lloyds and those companies severally
 3 subscribing to Boeing Policy Number 509/JC487006, Royal & Sun Alliance Insurance plc, RLI
 4 Insurance Company, St. Paul Fire & Marine Insurance Company, Great American Insurance
 5 Company, Mitsui Sumitomo Insurance Company of America, Tokio Marine & Nichido Fire
 6 Insurance Company, XL Specialty Insurance Company, Fireman's Fund Insurance Company, The
 7 Baloise Insurance Company, Ltd., Hartford Fire Insurance Company and Zurich Global Corporate,
 8 UK Ltd. (hereinafter "Defendants"). I declare the following upon information and belief.
 9

10 1. I attach hereto as Exhibit A a true copy of Plaintiffs' (nominal defendants
 11 therein) Motion to Transfer to the Western District of Washington Pursuant to 28 U.S.C. § 1404(a),
 12 filed on March 20, 2008.
 13

14 2. I attach hereto as Exhibit B a true copy of Plaintiffs' (nominal defendants
 15 therein) Motion to Dismiss that Action Due to a Prior Action Pending, filed on April 29, 2008.
 16

17 I declare the foregoing is true and correct under penalty of perjury of the laws of the
 18 United States.

19 Dated: Rye, New York
 20 April 29, 2008

21 
 22 Todd A. Barton
 23
 24
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